IN THE

United States Supreme Court

No. 78-736

DICK MEYERS TOWING SERVICE, INC.,
Petitioner

versus

THE UNITED STATES OF AMERICA; EBY AND ASSOCIATE OF ALABAMA; MARTIN K. EBY CONSTRUCTION COMPANY, INC.; and EQUIPMENT RENTAL AND SALES COMPANY, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Comes now Petitioner, Dick Meyers Towing Service, Inc., and prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled case on August 7, 1978.

OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit, 577 F. 2d 1023 (1978), and a copy of the Final Order granting Motions for Summary Judgment and the corresponding Order of Final Judgment rendered by the United States District Court

for the Northern District of Alabama, Western Division, on October 26, 1977 and January 27, 1978, respectively, are appended hereto in this Petitioner's Appendix at pp. 1a-8a.

JURISDICTION

The jurisdiction of the United States Supreme Court is invoked on the ground that there exists conflicting decisions of the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Second Circuit, and on the ground that Petitioner was denied recovery by the United States Court of Appeals for the Fifth Circuit based upon a reliance by said Court on the United States Supreme Court case of Robins Dry Dock and Repair Company v. Flint, 275 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 290 (1927). These aforementioned jurisdictional grounds confer upon the United States Supreme Court jurisdiction to grant this Petition pursuant to Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. In light of the conflicting decisions of the United States Court of Appeals for the Fifth Circuit in Dick Meyers Towing Service, Inc. v. United States, 577 F. 2d 1023 (5th Cir. 1978), and of the United States Court of Appeals for the Second Circuit in Petition of Kinsmen Transit Company, 388 F. 2d 821 (2nd Cir. 1968), does the law recognize a cause of action for recovery of loss of business expectancy proximately caused by the negligent acts or omissions of the Respondents in the present controversy in creating an obstruction to all waterborne commerce along a navigable waterway (Black Warrior River)?

II. May the factual contours of the present controversy be distinguished from those of Robins Dry Dock and Repair Company v. Flint, 275 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 290 (1927), so as to warrant recovery by Petitioner and circumvent the necessity of overturning said authority?

III. Does the law recognize a cause of action for the type damages sustained by the Petitioner in the present controversy as a proximate result of an obstruction along a navigable waterway (Black Warrior River) created by one or more of the Respondents, based on a theory of public nuisance?

STATUTES AND REGULATIONS

A. Title 28, United States Code, Section 1254.

Courts of appeals; certiorari, appeal, certified questions

Cases in the Courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

B. Title 28, United States Code, Section 1346.

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without

authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in Section 7426 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

C. Title 28, United States Code, Section 1332.

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) Citizens of a state, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

For the purpose of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: PROVIDED FURTHER, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

D. Title 33, United States Code, Section 403.

Obstruction of navigable waters generally, wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

STATEMENT OF THE CASE

On the 9th day of August, 1976, Petitioner Dick Meyers Towing Service, Inc., filed suit in the United States District Court for the Southern District of Alabama against the Respondents, United States of America, Eby and Associate of Alabama, a joint venture, and Martin K. Eby Construction Company, Inc. The Petitioner amended its Complaint on August 20, 1976 by adding as a Respondent, Equipment Rental and Sales Company, Inc. The jurisdictional basis upon which this suit was brought arose under 28 U.S.C. Sec. 1346, by reason of the claim being against the Respondent United States and under 28 U.S.C. Sec. 1332, by reason of the amounts in controversy and the diversity of citizenship.

The Complaint alleged, inter alia, that the Petitioner sustained a $250,000.00 loss of business expectancy as a result of the collapse of the Bankhead Lock and Dam and the cessation of all waterborne commerce on the Black Warrior River, in light of the fact that Petitioner was prevented from performing pre-existing contracts and was irretrievably committed to the use of said navigable waterway. The Petitioner claimed these damages were proximately caused by the unworkmanlike construction, the negligent construction, or the negligent design of the Bankhead Lock and Dam by Respondent Eby and Associate of Alabama, and/or the negligent operation, the negligent maintenance, or the negligent failure to inspect the operation, maintenance and construction of said Bankhead Lock and Dam by Respondent United States of America by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army.

The Petitioner joined Respondent Eby and Associate of Alabama with the Respondent United States based on its information and belief that a certificate of completion had not been issued by the Corps of Engineers as of the date of the said Lock and Dam collapse, that construction of said Lock and Dam was not substantially complete, and that Respondent Eby and Associate of Alabama was

still in control of the project on the date of collapse.

On December 30, 1976, the United States District Court for the Southern District of Alabama, Southern Division, granted the Respondent's request for a change of venue and ordered the case transferred to the United States District Court for the Northern District of Alabama, Western Division.

The Respondent Eby and Associate of Alabama filed a motion for summary judgment on September 21, 1977 and the Respondent United States of America filed a motion for summary judgment on September 28, 1977. The United States District Court for the Northern District of Alabama, Western Division, granted Respondents' motions for summary judgment on October 26, 1977 (App. p. 6a) and taxed costs to Petitioner on January 27, 1978 by its Order of Final Judgment (App. p. 8a).

From this October 26, 1977 grant of Respondents' motions for summary judgment, Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. On August 7, 1978, the United States Court of Appeals for the Fifth Circuit affirmed the United States District Court for the Northern District of Alabama, Western Division (App. p. 1a).

REASONS FOR GRANTING WRIT

It is the Petitioner's position that all three (3) of the questions sought to be reviewed are of a character warranting consideration by the United States Supreme Court, in light of the divergent opinions of the United States Courts of Appeal for the Second and Fifth Circuits in construing the United States Supreme Court case of Robins Dry Dock and Repair Company v. Flint, 275 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 290 (1927). Furthermore, the Petitioner urges this Honorable Court to distinguish the facts in the present controversy from the situation in Robins (supra).

ARGUMENT

In support of Petitioner's position and pursuant to United States Supreme Court Rule 23 (1) (h), Petitioner presents the following argument as amplification of each question heretofore raised:

I. IN LIGHT OF THE CONFLICTING DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN DICK MEYERS TOWING SERVICE, INC. V. UNITED STATES, 577 F. 2d 1023 (5th Cir. 1978), AND OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN PETITION OF KINSMEN TRANSIT COMPANY, 388 F. 2d 821 (2d Cir. 1968), DOES THE LAW RECOGNIZE A CAUSE OF ACTION FOR RECOVERY OF LOSS OF BUSINESS EXPECTANCY PROXIMATELY CAUSED BY THE NEGLIGENT ACTS OR OMISSIONS OF THE RESPONDENTS IN THE PRESENT CONTROVERSY IN CREATING AN OBSTRUCTION TO ALL WATERBORNE COMMERCE ALONG A NAVIGABLE WATERWAY (BLACK WARRIOR RIVER)?

A. NEGLIGENCE — CAUSATION — FORESEEABILITY DOCTRINE

In stark contrast to the above-referenced Kinsmen Transit doctrine is the decision of the United States Court of Appeals for the Fifth Circuit in Dick Meyers Towing Service, Inc. v. United States, 577 F. 2d 1023 (1978), the decision upon which this Petition is based, wherein the court held that Petitioner could not recover for the interference with his contractual relations unless it showed that such interference was intentional. In so holding, the Court construed Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303, 48 S. Ct. 134, 72 L.Ed. 290 (1927), as a blanket prohibition to all claimants who suffer loss of business expectancy or interference with contractual relations as a result of the negligence of others.

In Robins, the plaintiff was a time-charterer of a vessel who sued the owner of the dry dock for its negligence in damaging the vessel's propeller, thereby causing plaintiff's loss of business expectancy as a result of the unavailability of the vessel. (An extensive discussion of Robins is found infra pp. 29-31).

It is significant to note, however, that the Fifth Circuit, in reference to the traditional judicial reluctance to recognize claims based solely on harm to business expectancy, qualified its affirmation of the United States District Court's decision in the Dick Meyers case by closing as follows:

> "While the wisdom of that traditional reluctance is open to debate, the rule based upon it is too well-settled to be over turned by a panel of this Court." 577 F. 2d 1023 at p. 1025.

Consequently, the "buck" has been passed on to this Honorable Court for a final determination relative to the wisdom of Robins (supra) and its progeny.

The United States Court of Apeals for the Second Circuit, on the other hand, is the foremost authority with respect to the "negligence - causation - foreseeability" doctrine. Not only does the Second Circuit support this analysis, it could be said that same is the very creation of the Second Circuit.

This brain-child of the Second Circuit was conceived in Chief Judge Kaufman's extensive doctrinal analysis of the Robins decision in Petition of Kinsmen Transit Co., 388 F. 2d 821 (2d Cir. 1968). Therein, two claimants sought to recover additional expenditures necessary to fulfill various contractual obligations which were jeopardized by the negligent obstruction of the river at a point between the cargo-laden claimants and the point at which the claimants were to unload. This obstruction was caused when a vessel broke loose from its mooring and drifted downstream along with the first vessel. The end result was that both vessels crashed into a bridge, causing its collapse, and together with the two vessels, the obstruction was created. In the course of rejecting these claims on foreseeability grounds, Chief Judge

Kaufman cast doubt on the vitality of the Robins holding by stating inter alia:

> "Judge Burke refused to confirm either the Gillies or the Farr awards made by the Commissioner. He reasoned that the evidence established that the damages to Cargill and Cargo Carriers were caused by negligent interference with their contractual relations. In the absence of proof that the interference was intentional or with knowledge of the existence of the contracts, he concluded recovery could not be grounded in tort. Robins Dry Dock and Repair Company v. Flint, 275 U.S. 303, 48 S. Ct. 134, 72 L.Ed. 290 (1927). We too deny recovery to the claimants, but on other grounds.
>
> "We do not encounter difficulty with Judge Burke's analysis because it lacks some support in the case law; instead, we hesitate to accept the 'negligent interference with contract' doctrine in the absence of satisfactory reasons for differentiating contractual rights from other interests which the law protects... Professors Harper and James suggest that the application of the doctrine is wholly artificial in most instances. Id. at 501. We therefore prefer to leave the rock-strewn path of 'negligent interference with contract' for more familiar tort terrain. Cargill and Cargo Carriers argue broadly that they suffered damage as a result of defendants' negligence and we will deal with their claims in these terms instead of on the more esoteric 'negligent interference' ground.
>
> "Numerous principles have been suggested to determine the point at which a defendant should no longer be held legally responsible for damages caused 'in fact' by his negligence . . .
>
> "Such limiting principles must exist in any system of jurisprudence, for cause and effect succeed one another with the same certainty that night follows day and the consequences of the simplest act may be

traced over an everwidening canvas with the passage of time.

"In the final analysis, the circumlocution whether posed in terms of 'foreseeability', 'duty', 'proximate (sic) cause', 'remoteness', etc. seems unavoidable. As we have previously noted, 338 F. 2d at 725, we return to Judge Andrew's frequently quoted statement in Palsgraf v. Long Island R. R., 248 N.Y. 339, 354-355, 162 N.E. 99, 104, 59 A.L.R. 1253 (1928) (dissenting opinion): "It is all a question of expediency*** of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." 288 F. 2d 821 at pages 823, 824, 825. (Emphasis added).

Although the claimant's damages were held to be too remote a consequence of the defendant's negligence, the court properly, the Petitioner believes, rejected the abstract dichotomy between negligent and intentional interference with contract rights. Therefore, Petitioner urges that the present case be analyzed in the more progressive fashion via basic negligence principles, rather than being dismissed cavalierly by the application of an overused and "wholly artificial" doctrine.

An excellent example of the application of the Kinsmen "negligence-causation-foreseeability" analysis can be found in a case remarkably similar to the present controversy and originating from within the Fifth Circuit, In Re Lyra Shipping Co., Ltd., 360 F. Supp. 1188 (E. D. La. 1973). Therein, the claimant was allowed to recover for additional expenses (loss of profits, additional fuel, supplies and crew, etc.) incurred in fulfilling its contractual obligations by taking a more indirect alternate water route when the defendant's negligence resulted in obstructing canal locks on the most direct route. Damages sustained by another claimant while on the alternate route due to inclement weather were deemed too remote and not recoverable, the weather being an

independent, intervening and unforeseeable factor. It is most interesting to note that the plaintiff in In Re Lyra distinguished Robins in the same fashion as the Petitioner distinguishes Robins herein (infra pp. 29-31), namely that Robins is limited to denying recovery to those with whom the detained, revenue-producing property owner contracted. That is, third-party customers of the detained or delayed revenue-producing property owner may not recover, but the property owner may. The Court seemed persuaded and it authorized recovery for all those claimants who were forced to take alternate routes in fulfilling their contractual obligations, but stated that Cabot Corporation (a third party customer with whom one of the claimants contracted to deliver feedstock) would be denied recovery (had such a claim been filed) for any impairment of its contractual obligations with more remote parties due to the claimant's delayed delivery to Cabot.[1] Once again, the analogy may be drawn to the instant case. Obviously, Petitioner Dick Meyers stands in at least as good a position as did the claimants who recovered in In Re Lyra, the revenue-producing property owners, as they were described therein.

[1]Judge Cassibry added a footnote that is appropriate in this case:

"Defendant, in terrorem, suggests that to permit recovery of such costs to all carriers for the entire period the Industrial Canal Locks were closed to marine traffic would impose a crushing burden upon it. Plaintiffs suggest in response that no party should be able to recover such costs whose vessels were not already irrevocably committed to passage through the Locks at the time the accident occurred. The basis of this limitation is that once the nonavailability of the Canal became a foreseeable contingency, all shippers and carriers would be free in the future to protect their interests as best they could. Carriers could intelligently estimate their increased costs when offering their services; and shippers likewise could decide whether alternative modes of transportation should be employed in their business during the temporary emergency. It is argued, however, that those parties caught unawares were particularly vulnerable to the harm caused by the defendant's conduct and should be afforded special protection.

"I need not decide that question now, as all the present claims grow out of damages suffered by carriers actually traversing the Canal at the time the Galaxy Faith struck the Industrial Canal." 360 F. Supp. 1188 at Page 1191, fn. 3.

In fact, it is particularly important at this point to recognize that the Petitioner in the present case stands in a much better posture than did the respective claimants in either Kinsmen or In Re Lyra. That is, with respect to the issue of foreseeability, the Respondents in the present case were obviously in a much better position to foresee that an obstruction to the Black Warrior River would halt all waterborne commerce thereon. In the aforementioned cases, the defendants causing the obstructions were mere users of the same waterway as the claimants. On the other hand, the present respondents were in control (Eby as builder and the United States as designer and operator) of a structure designed, constructed, and operated as a navigational aid, and they were eminently aware that a collapse thereof, and the inevitable resultant cessation of waterborne commerce, were foreseeable results of a failure to exercise due care on their behalf. Similarly, the present Respondents' duty of care should be held to be greater for the very same reason, that the danger of loss is more clearly foreseeable to those who control a structure that, in the absence of its functioning properly, would cause a halt of all waterborne commerce.

Another case which adheres to the Kinsmen philosophy of using basic negligence principles in instances such as In Re Lyra and the present case is In Re China Union Lines, Ltd., 285 F. Supp. 426 (S.D. Tex. 1967). Therein, a collision in the Houston ship channel caused an obstruction and resulted in the channel being closed to all marine traffic for approximately two days. Another shipowner, who was not involved physically in the collision itself, filed suit against the vessel at fault in the collision for lost profits and additional expenses incurred in fulfilling existing contractual obligations. The Court stated inter alia:

> "As I view it, this is simply a case involving the maritime tort of negligence, for which the vessel's owner is liable for all damages proximately resulting therefrom (it having been previously determined that China Union was not entitled to limit its liability).

> "Certainly, the UNION RELIANCE owed a duty to all those using or seeking to use the ship channel not to obstruct their passage. Further, it was clearly foreseeable that a negligent collision in the narrow channel would effectively delay all traffic for at least some substantial period of time. When the negligence of the UNION RELIANCE caused the collision, the duty was breached and the foreseeable was made fact. Consequently, such damages as these claimants may prove were incurred, because denied normal access to the channel, are, in my opinion, recoverable." 285 F. Supp. 426 at page 427.

Another decision of interest from within the Second Circuit, which parallels the present controversy, is Federal Commerce and Nav. Co., Ltd. v. M/V Marathonian, 392 F. Supp. 908 (1975), a case upon which Respondent United States relied at the District Court level. While Robins was cited by the Marathonian Court as the basis for the denial of recovery, it did so with some reluctance, stating:

> "Indeed, were this Court now free to write upon a tabula rosa and not constrained by the weight of precedent, we would reject the negligent interference with contract doctrine in favor of a negligence-causation-foreseeability analysis, such as that adopted by Chief Judge Kaufman in Petition of Kinsman Transit Co., 388 F. 2d 821 (2d Cir. 1968)..." 392 F. Supp. 908 at 913 (emphasis added).

The Marathonian Court went on to say that the Robins decision should only be followed in instances involving the factual contours of that case, namely the negligent interference with a third-party time charterer's contract rights. And, as shall be pointed out infra (pp. 29-31) the facts of the present case are distinguishable from those of Robins, in that Petitioner does not occupy the position of a third party time-charterer, who was denied relief therein.

When the claimants appealed to the United States Court of Appeals for the Second Circuit, Federal

Commerce and Nav. Co., Ltd., v. M/V Marathonian, 528 F. 2d 907 (2nd Cir. 1975), Chief Judge Kaufman and company declined to overrule Robins and authorize recovery for the loss of business expectancy in light of the fact that the claimant was a time-charterer of a vessel damaged by the negligence of another, precisely the factual scenario involved in Robins. However, the Court, in noting its prior holding in Petition of Kinsmen Transit Co., (supra), expressed a preference for allowing recovery of lost business expectancies to at least the principal time-charterer, if not for the fact that the then present circumstances were indistinguishable from those in Robins.

An excellent discussion of the economic ramifications inherently associated with the prospect of recovery for the loss of business expectancy is found in Union Oil Company v. Oppen, 501 F. 2d 558 (9th Cir. 1974). Therein, commercial fishermen recovered profits lost as a result of a negligently caused oil spill which destroyed aquatic life in the Santa Barbara, California ship channel. In response to the majority rule that no cause of action lies against one whose negligence prevents another from obtaining a prospective pecuniary advantage, the Court asserted that said rule was intended only to prevent recovery from "remote and speculative injuries" which a negligent defendant "could not foresee in any practical sense of the term" (501 F. 2d 558 at p. 563). After outlining several exceptions to the general rule against recovery, the right to recover economic losses which are parasitic to an injury to the person or property of a claimant, for example, the Court held that reasonable foreseeability is the crucial factor in deciding what injuries are compensable (p. 569), so long as the injuries could be established with reasonable certainty (p. 570). From a purely economic standpoint, the Ninth Circuit deemed the defendant oil company the "best cost-avoider" after applying Professor Calabresi's analysis from his treatise, The Cost of Accidents, pp. 69-73 (1970). Union Oil was said to have the superior capacity to bear the burden of "buying out" the plaintiffs.

Similarly, the Respondents herein can be said to possess a capacity superior to that of Petitioner to "buy out" the latter.

Although the aforementioned authorities are quite formidable, perhaps a more persuasive rationale for the Petitioner's position in the present controversy is found in Berg v. General Motors Corporation, 87 Wash. 2d 584, 555 P. 2d 818 (1976). Therein, the Supreme Court of Washington awarded a commercial fisherman damages for loss of profits resulting from negligence of the manufacturer of a diesel engine and clutch. At this point, it must be pointed out that although Berg is a products liability case, it is analogous to the building of the Bankhead Lock and Dam which was designed to accommodate commercial vessels. The Berg court held that a manufacturer intending and foreseeing that its product would eventually be used by persons operating commercial ventures owed such persons a duty not to impair their commercial operations by a faulty product. The court stated further that all harm generated by such work stoppage, i.e., lost profits, is well within the zone of danger created and foreseen by such a negligent act. Similarly, when the Respondents undertook the Bankhead project they were fully aware that a faulty Lock and Dam would have a devastating effect on all waterborne commerce on the Black Warrior River. Hence, due to the foreseeability of lost profits, the same are compensable under the present circumstances.

Before concluding this section, the Petitioner deems it appropriate to discuss the views of several commentators who advocate the abolition of the intentional-negligent interference with contract relations dichotomy. As was set out in quotes above in the Marathonian case, Professors Harper and James call the dichotomy "wholly artificial". They go further in their treatise at 1 F. Harper & F. James, The Law of Torts §6.10 pp. 501-505 (1956) by suggesting that had there been no third-party charter party in the Robins case, there seems to be no doubt that the vessel owner could have recovered for the loss of the vessel's use which resulted from its

propeller being negligently damaged. By comparison, this is precisely what the Petitioner has been asserting all along. Professors Harper and James state further that a defendant's knowledge of the existence of a contract between the injured party and third persons is irrelevant if the general principles of negligence are applicable. It should be enough, they say, to establish a prima facie case if the defendant, as a reasonable man, should have known of the likelihood of the existence of the contract and thereafter created an unreasonable risk of interfering with it.

In one of Professor James' many articles, "Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal," 25 Vand. L. Rev. 43, (1972), he analyzes the general rule barring recovery for negligent interference with business expectancy and takes issue with the assertion that if liability is recognized in such instances that a floodgate of infinite liability would result, by stating:

> "It remains to be considered whether the present rule may be too broad—whether its sweep may exclude liability in some situations to which the pragmatic objection has no valid application. Take, for example, the case of a ship's charterer who loses its use, and even may have to pay hire, during the time when the ship is laid up for repairs necessitated by defendant's negligence. If there were no Charter, the owner who lost the vessel's use could recover for that loss measured by its reasonable value. If the defendant were liable to the charterer instead, it would not be a wide and open-ended liability, but a finite one that the tort-feasor or his insurer would expect to pay under frequently occurring circumstances. There seems to be no valid reason why defendant should escape this ordinary item of damage just because the loss in this case happened to be suffered by one who had no proprietary interest in the ship. What has been called the pragmatic objection simply has no application. There are some practical—or 'pragmatic'—difficulties, but they are

> of a different nature and a lower order of magnitude. There are questions of proper parties, of the proper measure of damages, of the protection of defendant against multiple vexation and double liability, and of protection of the settlement process. All these difficulties, however, are readily solvable by familiar procedural devices. The presence of both the charterer and owner as parties plaintiff in the suit could be required, and this would answer proper parties and multiple vexation questions. The measure of damages, in any event, should be limited to reasonable value. Settlement in good faith with either party should be held to bar the other on the very appropriate analogy from the law of bailment." 25 Vand. L. Rev. 43 at pp. 55-57.

Similarly, a student note authored by Roger B. Godwin entitled "Negligent Interference with Economic Expectancy: The Case for Recovery", found at 16 Stanford L. Rev. at 693-94 (1964) concludes:

> "In this area the very existence of the black-letter rule denying recovery has undesirable effects both on the incentive to compromise and on the results of litigated cases. Consequently recovery is too often not obtained when in terms of the interest analysis earlier developed it is clearly merited and socially desirable. The inevitable result will be improper distribution of loss in many cases and utter failure to deter negligent conduct toward economic interests in all.
>
> "The rule against recovery for negligent interference with economic expectance should be relaxed. The determination of whether recovery should be permitted in particular cases will involve the weighing of several factors. The prerequisites of negligent conduct, actual causation and foreseeability of harm must be satisfactorily established. The recovery should follow if it is indicated by a balancing of the interests in favor of recovery which include the plaintiff's interest in his

economic expectancy and the social interest in the stability of economic relations and discouragement of negligent conduct, and the interests against recovery, including the interests of defendant and society in a maximum of freedom of action. The social interest in allocating loss to the better loss distributor may appear on either side of the scale, will often be irrelevant, and probably must be applied to classes of fact situations rather than to each case, but it should be included in this balancing test where it is appropriate. Only when this rule against recovery has been eliminated will economic expectancies receive the protection which writers have urged, which the courts are beginning to grant, and which their social importance justifies."

In a 1977 U. of Virginia Law Review article entitled "Negligent Interference With Contract: Knowledge As a Standard For Recovery", 63 Va. L. Rev. 813 (1977), both the Robins and the Kinsmen approaches were critiqued from an economic standpoint of shifting loss to the "least cost avoider", thereby minimizing the social costs of negligence and avoiding the imposition of potentially huge liability on individuals, as advocated by Professor Calabresi in The Costs of Accidents, pp. 24-26 (1970). The "least cost avoider" was said to be the member of a class that can avoid accidents at the least expense to the resources of society. In applying this analysis to the traditional foreseeability standard for limiting liability, the author observed that where an accident is not reasonably foreseeable, its expected cost is less than the cost of discovering and avoiding it, and the responsible actor is not negligent.

While both Robins and Kinsmen were deemed inefficient in producing the "least cost avoider", recognition of negligent interference with contractual relations was strongly advocated. The author was not persuaded by the traditional justifications for denying recovery for foreseeable interferences with contracts, such as excessive litigation, collusive lawsuits, and uncertainty in the measurement of economic loss. However, a more

restrictive limitation than that applied in the main body of negligence law was said to be justified in the contract context. The qualifying standard suggested to prevent unlimited liability was that of "specific foreseeability". That is, to be held accountable for the negligent interference with business expectancy, a tortfeasor must know or have reason to be aware of the following elements: the existence of the contractual interest, the risk of interfering activity, the risk of harm to a particular plaintiff or a limited class, and the type damages that are likely to result.

Certainly, this uniform standard of specific foreseeability is preferable to an ad hoc reaction to particular circumstances, the latter demonstrated by the Robins progeny. Applying the former to the present controversy, Petitioner submits that Respondents had reason to know that their failure to exercise due care in their respective realms of control would produce an unreasonable risk of economic harm to those who were dependent upon the Black Warrior River for their livelihood.

Indeed, to hold otherwise would be to establish a mandate for many to act with impunity in light of known risks to others. If recovery is said to be out of proportion to the Respondents' fault, a denial thereof can be no less out of proportion to Petitioner's entire innocence.

Recovery should not be denied simply because, in other situations, indirect economic losses may be too wide and open-ended. Why should the burden of loss be placed on the victim, regardless of the parties respective abilities to bear such loss? In the present situation, they are just as finite (not to mention just as significant) as those associated with personal injury or property damage involving the same sort of actionable conduct. The argument that, once a duty is found in one plaintiff, it cannot be denied to others, is invalid, since the situations of prospective plaintiffs will vary significantly and the right of each to recover may be individually determined on a case-by-case basis using traditional, restrictive standards such as foreseeability.

Therefore, it can readily be seen that there exists substantial and persuasive authority which favors the

abolition of the negligent-intentional interference with contract dichotomy. With this in mind, Petitioner trusts this Honorable Court will dispense therewith, and analyze the present case in terms of basic negligence principles. The crucial issue then is: "foreseeability of the damages to Petitioner's business expectancy." In view of such cases as Kinsmen, In Re Lyra, and In Re China Union Lines, and the foregoing scholarly criticism, the Petitioner submits that it is beyond doubt that Respondents knew or should have known that the construction of a faulty Lock and Dam or improper maintenance thereof would have a disastrous impact on all those engaged in waterborne commerce on the Black Warrior River. Hence, upon the Respondents' failure to exercise due care as required, they should be held accountable for such foreseeable damages as are claimed by Petitioner.

In order to assuage judicial fears that recognition of liability in such instances would result in an infinite, wide-open liability and a multiplicity of litigation, Petitioner submits first of all that, in the present case, the statute of limitations has run as to any prospective claimant who otherwise would have had an action against the Respondents arising from the Lock and Dam's collapse. Furthermore, Petitioner merely asks this Honorable Court to authorize recovery in those instances solely within the factual contours of the present controversy so that no open-ended liability would result. That is, recovery could be authorized by applying the following standard: A commercial enterprise, owning revenue-producing property, which necessarily traverses navigable waters in performance of its commercial ventures, may recover for the loss of business expectancy (including lost profits, overhead expenses, and additional expenses associated with traversing alternate routes) proximately resulting from the negligent obstruction of said commercial enterprise's principal navigable water route, where an irrevocable commitment had formerly been made by said enterprise to traverse said route pursuant to the performance of contracts existing prior to and contemporaneous with the negligent act or series of acts.

In a relatively recent Harvard Law Review article, "Torts—Interference With Business or Occupation—Commercial Fishermen Can Recover Profits Lost As a Result of Negligently Caused Oil Spill.—Union Oil Co. v. Oppen, 501 F. 2d 558 (9th Cir. 1974)", 88 Harvard L. Rev. 444 (1974), the author summed up the basic misconception associated with the rule of nonliability for negligent interference with contractual relations:

> "Perhaps more important, the nonliability rule frequently does not achieve a broad distribution of losses. In some cases, the economic consequences of a negligent act are largely borne, not by the whole community, but by a few businesses or individuals. These injured parties may be incapable of absorbing or passing on their losses, causing further economic and social dislocation. While it is undesirable to place a crushing burden of liability on a negligent defendant, it is worse to leave such a burden on a few nonnegligent plaintiffs. Moreover, it is in just such situations that arguments based on conservation of judicial resources are weakest; the courts will not be overwhelmed by the task of adjudicating the claims of a few severely injured plaintiffs." 88 Harvard L. Rev. 444 at pp. 450-451.

The author went even further, however, by advocating an alternative to the traditional rule of nonliability in negligent interference with contract cases, namely, the "distinctive injury test". That is, a prospective plaintiff, in order to recover for the loss of business expectancy, must establish that he suffered injury different in kind from that suffered by the public generally. The proposed criteria was designed to prevent recovery in cases in which the economic repercussions of a negligent act were spread more or less equally throughout the community, but would permit compensation to the most severely injured plaintiffs in cases in which losses were not in fact so widespread. Since by definition, only a fraction of those injured could recover their losses, the proposed test was said to restrain

the twin terrors of unlimited liability and unending litigation. Consequently, the "distinctive injury test" would ameliorate hardship created by the traditional rule of nonliability, while providing a functional limit to the scope of liability.

B. Respondents' Duty Of Care

Once the "negligence-causation-foreseeability" doctrine, or some hybrid thereof, has been adopted by this Honorable Court, the issue of respondents' duty of care with respect to Petitioner must be addressed.

The Petitioner would certainly agree that prior to the letting of Contract No. DACW 01-72-C-1055 neither Eby and Associate of Alabama, nor Martin K. Eby Construction Co., Inc. nor Equipment Rental and Sales Company, Inc., hereinafter collectively known as Respondents, owed a duty to those engaged in waterborne commerce to aid or maintain such commerce on the Black Warrior River, a navigable waterway. Likewise, Respondent United States of America owed no duty to aid or maintain waterborne commerce until it sought to alter the natural flow of the Black Warrior River with the original John Hollis Bankhead Lock and Dam. The Petitioner has no quarrel with the proposition that the Respondent United States may authorize the obstruction of a navigable waterway for a legitimate purpose. However, once the construction contract was let, the Respondents who were awarded said contract owed a duty to those engaged in waterborne commerce to construct the project with due care, so as not to unduly obstruct the free flow of commerce. Likewise, once the Respondent United States commenced the project through its agency and instrumentality, the Mobile District Corps of Engineers, it assumed a duty to exercise due care with respect to project design, construction, supervision, and project maintenance once construction was completed.

The basis upon which the aforementioned duties rest is outlined in Indian Towing Co. v. United States, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48, (1955), wherein the

Court found the Coast Guard negligent for its failure to repair a lighthouse, thus causing a barge to run aground and concomitmant cargo damage. In the majority opinion by Justice Frankfurter, he stated inter alia:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." 350 U.S. 61 at page 69.

The majority opinion went on to state that the Federal Tort Claims Act (28 U.S.C. §1346) rendered the United States liable in the same manner and to the same extent as a private individual under like circumstances.

The Indian Towing Co. case is analogous to the present controversy in that while none of the Respondents in the latter owed a duty initially, each one assumed a duty to perform its obligations with due care. Upon the failure to exercise due care, represented by the failure and ultimate collapse of the Bankhead Lock and Dam, the Repsondents were liable for all damages proximately caused thereby.

In a more recent decision, Afran Transport Company v. United States, 309 F. Supp. 650 (1969), the Court held the Coast Guard liable for the stranding of a vessel under circumstances similar to Indian Towing. In rationalizing its position, the Court stated that once the Coast Guard exercised its discretion to establish channel buoys and engendered reliance on the guidance afforded thereby, it was obligated to use due care to make cetain that the buoys were kept in good working order. As in Indian Towing, failure to exercise due care with respect to such an assumed responsibility results in liability for all

proximate damages caused thereby. Similarly, in United States v. Sandra & Dennis Fishing Corp., 372 F. 2d 189 (1967), the Coast Guard was held liable for negligent towage of a disabled vessel. The Court stated that although the government had no obligation to aid the disabled vessel, it could not mislead or induce reliance upon belief that it was providing something which in fact it was not providing. The fact that the Coast Guard vessel had equipment insufficient for such towage and failed to warn the crew of the disabled vessel gave rise to its liability in tort.

Another recent decision which enhances Petitioner's position is Burgess v. M/V Tamano, 373 F. Supp. 839 (1974). Therein, commercial fishermen and commercial clam diggers were allowed to recover damages against the United States for its negligence in channel buoyage which contributed to an oil spill and its negligence in pollution abatement activities. In justifying its decision the Court states:

> "... that the United States, in undertaking any 'good Samaritan' task such as buoyage or pollution abatement, is liable in tort for the consequences of its negligence to the same extent as a private person would be liable under similar circumstances." 373 F. Supp. 839 at page 844.

C. Damages Compensable.

With respect to damages sustained by the Petitioner, there remains but one issue pertaining thereto within the context of a "negligence-causation-foreseeability" analysis: whether such damages were speculative or whether they were reasonably ascertainable.

There are indeed numerous cases where courts have deemed it proper to compensate the injured party for lost profits sustained as the proximate result of a tortfeasor's negligence. One of the earlier cases addressing the questions is The Petar, 68 F. Supp. 295 (1946), wherein the Court denied the recovery for loss of future profits under a charter as the result of the loss of the chartered vessel in a

collision. Nevertheless, the determinative factor was whether there existed a reasonable certainty of gain. If so, the future profits were recoverable. If, on the other hand, the profits were subject to various contingencies, they were deemed too remote to admit of recovery, as was the case on that particular occasion. Another early case dealing with the same issue is Woodbury v. United States, 75 F. Supp. 829 (1948), wherein the court allowed the owner of a commercial fishing vessel to recover lost profits while new fishing gear was being obtained to replace that which was destroyed by the negligence of a United States submarine.

In later decisions, the courts have gone much further than merely authorizing the recovery of lost profits. In Moore-McCormack Lines v. The Esso Camden, 244 F. 2d 198 (2nd Cir. 1957), money actually expended in maintaining the injured party's vessel during the voyage's delay caused by the negligence of the defendant was recoverable along with loss of potential earnings. Again the determinative factor was said to be whether the lost profits could be proven with reasonable certainty. Evidence relevant to the fair measure of loss of profits was said to be the daily earnings in pre-collision and post-collision voyages as well as earnings of similar ships in the same market at or about the period of detention. The Court in Mid-American Transportation Co. v. Rose Barge Lines, Inc., 347 F. Supp. 566 (1972), authorized recovery of lost profits by a barge owner against the defendant tugboat operator for the negligent grounding of three barges it was maneuvering. The lost profits were said to be a "loss-of-use" damage measured by the average daily earnings multipled by the aggregate number of days the three barges were out of commission.

The Fifth Circuit affirmed the award of similar loss-of-use damages to a shrimper whose vessel was damaged in a collision with another vessel. See The Aurora, et al., 153 F. 2d 224 (1945). At the District Court level, The Aurora, et al., 64 F. Supp. 502 (E.D.La. 1945), the Court held that in addition to the cost of repairs, the shrimp boat owner was entitled to compensation for the

deprivation of the use of said vessel in its customary shrimp freighting and trawling operations during the period it was being repaired.

Likewise, in Mid-American Transportation Co., Inc. v. Cargo Carriers, Inc., 480 F. 2d 1071 (8th Cir. 1973), the court held that a barge owner was entitled to compensation for the loss of profits during the period of repairs to a barge damaged by the negligence of the defendant towing company. These lost profits were deemed compensable notwithstanding the fact that the exact amount was difficult to determine. In addition to lost profits, prejudgment interest on the amount ultimately recovered was deemed recoverable at the trial court's discretion. See also Daniels Towing Service, Inc. v. Nat Harrison Associates, 432 F. 2d 103 (5th Cir., 1970), wherein the Fifth Circuit Court of Appeals found that where the exact loss was unascertainable, a just and reasonable estimate of damage on relevant data may be made and a verdict rendered accordingly.

A final case of interest at this point is The Aquitania, 270 F. 239 (S.D., N.Y., 1920). This pre-Robins decision authorized recovery for loss-of-use damages although the plaintiff was a mere time charterer of the subject vessel damaged. The Court opined that investment and venture must be encouraged by the free flow of commerce on land and water, and that any rule of law which would permit a tortfeasor to escape liability, arrested commercial progress. A wrong was done from which injury flowed. Hence, the time-charterer, who was said to have a property interest in the vessel by virtue of a government form of charter, recovered the actual disbursement it was obliged to make and loss-of-use damages as aforesaid.

II. MAY THE FACTUAL CONTOURS OF THE PRESENT CONTROVERSY BE DISTINGUISHED FROM THOSE OF ROBINS DRY DOCK AND REPAIR COMPANY V. FLINT, 275 U.S. 303, 48 S. CT. 134, 72 L.Ed. 290 (1927), SO AS TO WARRANT RECOVERY BY PETITIONER AND CIRCUMVENT THE NECESSITY OF OVERTURNING SAID AUTHORITY?

Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303, 48 S. Ct. 134, 72 L.Ed. 290 (1927), is the foundation upon which the Respondents' position rests. However, the following analysis will demonstrate that recovery in the present case is not inconsistent with the holding in Robins. In Robins, time-charterers of a vessel were seeking recovery for detention of the vessel resulting from negligent damage during shipyard repairs. The owners of the vessel settled and released all of their claims against the negligent party. Mr. Justice Holmes, who delivered the opinion of the Supreme Court, stated that the negligent damage to the propeller was a wrong only to the vessel's owner, not a wrong to one with whom the said owner had contracted. The precise holding is stated as follows:

> " . . . a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." 275 U.S. 303 at page 309.

In other words, under Robins, it appears that an owner whose revenue-producing property is detained may indeed recover, but one with whom the owner contracted is barred from recovery for his impairment from the same detention of the same property.

To assert that Robins supports the denial of relief to Petitioner under the present circumstances is to misconstrue the true nature of these circumstances. Petitioner's counterpart in the Robins situation is the

owner of the revenue-producing property who recovered, not the third party customer with whom the owner contracted, who was denied relief. If Petitioner's customers with whom it had contracted at the time of the collapse of the Bankhead Lock and Dam and during the period of the reconstruction and repair thereof had been before the Court below, the Robins rationale would have supported the grant of Respondents' motions for summary judgment. However, since the Petitioner stands in the position of the party who recovered (albeit settled) in Robins, Petitioner is entitled to recovery in the present controversy.

In summary, it is the Petitioner's contention that if Robins is analogous to the present case, it supports recovery rather than the denial thereof.

It is indeed significant at this point to note the attitude of the Fifth Circuit with respect to the foregoing argument. In Dick Meyers Towing Service, Inc. v. U.S., et al. (supra) the Court, in response to said argument, opined that Petitioner had misconceived the basis for denial of recovery in Robins and Kaiser Aluminum (infra p. 31). However, our misconception was not said to be one of logic or a faulty reading of the law, rather a non-recognition of the traditional, economic policy decision of most courts to disregard claims based solely on harm to the interest in contractual relations or business expectancy. The critical factor was said to be the character of the interest harmed and not the number of parties involved. If this is true, why then did Justice Holmes go to such lengths to frame the Robins opinion in terms of the parties involved? Indeed, the critical factor is, according to Robins, the arrangement of the parties rather than the character of the interest harmed.

Perhaps of equal significance, however, is the fact that this Honorable Court in Robins appeared to ratify recovery although there was no impact or collision of any kind, as is generally the case when a commercial enterprise is awarded lost profits in negligence cases. Therefore, it would follow that the United States Supreme Court would not require an impact or collision

in order that lost profits be awarded in a situation such as the present case, since it was the negligent repair of a vessel in Robins rather than a collision through negligence that gave rise to the cause of action.

The same basic premise holds true for Kaiser Aluminum and Chemical Co. v. Marshland Dredging Co., 455 F. 2d 957 (5th Cir. 1972), upon which Respondents relied below. In Kaiser Aluminum, the negligent defendant punctured a gas pipeline which fueled the plaintiff corporation's plant. The court denied recovery citing Robins, but again the plaintiff in Kaiser Aluminum was a third party incidentally injured, rather than the party directly injured, namely the gas company.

III. DOES THE LAW RECOGNIZE A CAUSE OF ACTION FOR THE TYPE DAMAGES SUSTAINED BY THE PETITIONER IN THE PRESENT CONTROVERSY AS A PROXIMATE RESULT OF AN OBSTRUCTION ALONG A NAVIGABLE WATERWAY (BLACK WARRIOR RIVER) CREATED BY ONE OR MORE OF THE RESPONDENTS, BASED ON A THEORY OF PUBLIC NUISANCE?

In addition to the theory of negligence in the present case, there exists the prospect of recovery for the pubic nuisance created by the obstruction of the Black Warrior River during reconstruction and repair of the Bankhead Lock and Dam after its collapse.

In early cases such as Georgetown v. Alexander Co., 12 Pet. 98, 9 L.Ed. 1012 (1838) and Union Pacific Railroad Co. v. Hall, 91 U.S. 343, 355, 23 L. Ed. 428 (1875), this Honorable Court recognized that an obstruction to navigable water may be enjoined by a private person who is injured thereby differently from the general public, either in kind or degree. Adhering to this rationale is Piscataqua Nav. Co., et al. v. New York, N.H. & H.R. Co., 89 F. 362 (D. Mass. 1898), wherein a channel became obstructed through the collapse of a bridge-draw spanning the channel, caused by the negligence of the owner thereof.

The Court held that the bridge owner owed a special duty to afford all reasonable and proper accommodation for vessels having occasion to pass through the draw-bridge, and was liable for a breach of such duty. Although the obstruction was deemed a public nuisance, the vessel owners were awarded special damages sustained by reason of their detention caused by the bridge collapse. Subsequent examples of judicial approval for private actions against those who create a public nuisance by unreasonable obstruction of navigable waterways include E. A. Chatfield Co. et al. v. City of New Haven et al., 110 F. 788 (D. Conn. 1901), Oliver et al. v. Klamath Lake Navigation Co. et al, 102 P. 786 (1909), and Carver et al. v. San Pedro, L.A., & S.L.R. Co., 151 F. 334 (S.D. Cal. 1906).

In the present case, the Petitioner contends that Section 10 of the "River and Harbors Act of 1899", codified in part as Title 33, U.S.C., Section 403, forms the basis of a private action against one who obstructs a navigable waterway of the United States without affirmative authorization from Congress. Although the construction of the Lock and Dam was authorized at the outset, it cannot be said that Congress authorized the negligent construction and/or maintenance thereof, nor the concomitant obstruction of the Black Warrior River during the period of repair occasioned by Respondents' negligence. Petitioner asserts further that due to the fact that it is a commercial enterprise which had existing contractual obligations and was irrevocably committed to the use of the Black Warrior River in pursuit of the fulfillment thereof, the obstruction of the river caused it to suffer special injury, different in kind and/or degree from that suffered by the public at large.

In support of this contention, Petitioner offers Lauritzen v. Chesapeake Bay Bridge and Tunnel District, 259 F. Supp. 633 (1966) as a case in point. The Lauritzen Court held that, while Federal navigation regulations prohibiting the obstruction of navigable waterways did not expressly provide for a cause of action for injured private parties, such liability was clearly

implied and that civil liability in that instance was derived from 33 U.S.C. Section 403, pertaining to protection of navigable waters in favor of both the United States and private parties. Therefore, it follows that those who obstruct navigable waterways not only become liable to the United States, but in addition, subject themselves to civil liability to any person or persons they particularly may have harmed as a result of the obstruction.

In Potomac Riv. Ass'n. Inc. v. Lundeberg Md. Sea. Sch., Inc., 402 F. Supp. 344 (1975), the Court follows Lauritzen, but seeks to restrict the basis upon which a private party may maintain an action for the violation of the Rivers and Harbors Act, stating that the clear weight of authority indicates that only activities which result in obstructions to navigation and anchorage are actionable. That is, the only private parties who have standing are those possessing navigational interest, those who use the waterway obstructed, as opposed to riparian landowners, for instance. This same restriction was set forth by the Fifth Circuit in Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140 (N.D. Ala. 1971), affirmed per curiam, 456 F. 2d 1294 (5th Cir. 1972). Therein, at the District Court level, 33 U.S.C., Section 407 (which pertains more particularly to unauthorized deposits in navigable waters) was construed. The Court stated that the purpose and extent of said Section was to assist the federal government in insuring that the country's navigable waterways remain free of obstruction and to protect the special interest in freedom from such obstructions of those who use the nation's waterways for purposes of navigation. Therefore, the Court reasoned, any right or injury, unrelated to interference with rights of navigation, is outside the special federal interest and protection covered by the aforementioned section.

The next question is whether Petitioner may recover for the obstruction's interference with its business expectancy. In Lauritzen, the injury compensated resulted form the striking of an underwater obstruction. However, the Petitioner submits that where one is prevented from prosecuting his business enterprises as a

result of such an obstruction, the injury sustained is just as important as damage to his body or his chattels, even though the injured party had no physical contact with the obstruction. In the economics of the tugboat business, costs continue but revenue ceases when the tugs are unable to transport barges.

In Gulf Atlantic Transport Co. v. Becker County Sand and Gravel Co., 122 F. Supp. 13 (E.D. No. Car. 1954), a barge owner brought suit against a sand and gravel company for damages caused when the barge struck a shoal maintained by the sand and gravel company. The Court held that the shoal was as unreasonable and unauthorized obstruction of a navigable stream and constituted a public nuisance as per 33 U.S.C., Section 403. The barge owner was awarded damages for the loss of the vessel's services during the period of repairs, in addition to the cost of reparation. The Court further held that these detention damages were best measured by the sum for which a similar vessel could be chartered in the market. In the absence of such a market, however, the value of her use to her owner was held to be a proper basis for estimating such damages, but it must be shown with reasonable certainty that the vessel would have been employed and that her average daily earnings would have amounted to the sum sought to be recovered for each day's detention. It may be noted that the Court in Gulf Atlantic based its award of loss-of-use damages upon a pre-Robins United States Supreme Court decision, The Conqueror, 166 U.S. 110 (1897).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

J. M. DRUHAN
Attorney for Petitioner

MICHAEL A. WERMUTH
Attorney for Petitioner

THOMAS P. OLLINGER, JR.
Attorney for Petitioner

STATE OF ALABAMA)

COUNTY OF MOBILE)

I, the undersigned Notary Public, in and for said County in said State, hereby certify that MICHAEL A. WERMUTH and THOMAS P. OLLINGER, JR., who are known to me, acknowledged before me on this day that, being informed of the contents of the foregoing, they, as counsel for the Petitioner, affixed their signatures hereto voluntarily on the day the same bears date.

GIVEN under my hand this the 31st day of October, 1978, in authentication of which I have hereunto affixed my official seal.

Cindy B. Williams
NOTARY PUBLIC, STATE AT LARGE
My Commission Expires April 27, 1982

CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Petition have been served on the counsel of record for each Respondent on the 31st day of October, 1978, by United States mail, postage prepaid, and properly addressed.

J. M. DRUHAN

APPENDIX

INDEX TO APPENDIX

DICK MEYERS TOWING SERVICE, INC., a corporation, Plaintiff-Appellant,

v.

The UNITED STATES of America, a corporation sovereign, Eby & Associate of Alabama, a joint venture and Martin K. Eby Construction Co., Inc., a corporation, Equipment Rental and Sales Co., Inc., Defendants-Appellees.

No. 78-1021

Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Aug. 7, 1978.

Tugboat operator brought action against United States and private construction company seeking damages flowing from negligent interference with business expectations involving the construction and maintenance of a lock. The United States District Court for the Northern District of Alabama, J. Foy Guin, Jr., J., granted summary judgment for defendants, and appeal was taken. The Court of Appeals held that a plaintiff may not recover for interference with his contractual relations unless he shows that the interference was intentional or knowing.

Affirmed.

*Rule 18,5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casulty Co. of New York et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

1. Federal Courts 15

In action in which United States was a defendant jurisdiction over private parties was proper under doctrine of pendent party jurisdiction. 28 U.S.C.A. §1346.

2. Torts 12

A plaintiff may not recover for interference with his contractual relations unless he shows that the interference was intentional or knowing.

3. Torts 10 (1)

Where essential character of plaintiff's claim was recovery for negligent interference with his business expectations, no recovery was available even though plaintiff couched his claim in language of private action based on public nuisance.

Michael A. Wermuth, J. M. Druhan, Jr., T. P. Ollinger, Jr., Mobile, Alabama, for plaintiff-appellant.

James A. Lewis, Atty., Barbara A. Babcock, Asst. Atty. Gen., Ronald R. Glancz, Atty., Admiralty & Shipping Section, Dept. of Justice, Washington, D.C., J. R. Brooks, U.S. Atty., Birmingham, Alabama, for the U.S.

McDaniel, Hall, Parsons & Conerly, Jack J. Hall, Tom E. Ellis, Birmingham, Alabama, for Eby & Associate of Alabama.

Appeal from the United States District Court for the Northern District of Alabama.

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

PER CURIAM.

(1) In August, 1975, plaintiff Dick Meyers Towing Service, Inc. (Meyers), was operating tugboats and other vessels on the Black Warrior River in Alabama, near the Bankhead Lock and Dam. On August 11, 1975, the lock failed and the river was closed to traffic until five months later when the lock was repaired and the river reopened to

commerce. Plaintiff alleged that the failure of the lock was due to defendant Eby's negligent construction of the lock and defendant United States' negligence in maintaining and operating it. The cessation of commerce and transportation caused economic harm to the plaintiff's business and recovery in the amount of $250,000 was sought.[1]

The case is before us on appeal from the trial court's grant of summary judgment for the defendant. We affirm.

The plaintiff seeks recovery for damages flowing from the defendant's negligent interference with his business expectancies. Although the plaintiff has cited much learned opinion and respected authority in support of his suggestion that we follow the Second Circuit's lead and forsake "the rock-strewn path of 'negligent interference with contract' for more familiar tort terrain," Petition of Kinsmen Transit Co., 388 F 2d 821, 824 (2nd Cir. 1968), we are convinced that prior authority in this circuit precludes us from departing from the rule that merely negligent interference with contract rights is not actionable. Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F. 2d 957 (5th Cir. 1972).[2]

[1]Jurisdiction over the claim against the United States is based on 28 U.S.C. §1346. Jurisdiction over the private parties was proper under the doctrine of "pendent party" jurisdiction recognized in this circuit. See Florida East Coast Ry. Co. v. United States, 519 F. 2d 1184, 1193-96 (5th Cir. 1975). Jurisdiction could also have been founded on the admiralty jurisdiction of the federal courts since the Black Warrior River was stipulated to be a navigable waterway and the tort claims here have a maritime nexus. See In re Motor Ship Pacific Carrier, 489 F 2d 152 (5th Cir.), cert. denied 417 U.S. 931, 94 S. Ct. 2643, 41 L.Ed. 2d 235 (1974); Kelly v. Smith, 485 F. 2d 520 (5th Cir. 1973), cert. denied 416 U.S. 969, 94 S. Ct. 1991, 40 L.Ed. 2d 558 (1974).

[2]We have been much enlightened by the excellent briefs submitted by the parties in this case and commend all counsel for their efforts.

Appellant recognizes that Kaiser Aluminum, supra and Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), raise substantial barriers to his recovery. He, therefore, attempts to distinguish these cases on their facts and narrowly limit the sphere of their application.

The facts of each case may be stated quite summarily. The plaintiff in Robins, a time-charterer of a vessel, sued the owner of a dry dock which had negligently damaged the vessel's propeller. The plaintiff sought recovery for damages suffered as a result of the vessel's unavailability on the charter date. In the opinion by Justice Holmes, the Supreme Court denied recovery, holding that "as a general rule, . . . a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong." 275 U.S. at 309, 48 S.Ct. at 135.

Kaiser Aluminum, like Robins, involved a three-party situation. Kaiser sued Marshland for consequential damages suffered by Kaiser when one of Marshland's barges dropped a heavy anchor on a gas pipeline owned by a third party, Sugar Bowl Gas Company. The pipeline supplied gas to Kaiser's plant which had to be shut down temporarily as a result of the interruption of gas supplies. We affirmed the district court's grant of summary judgment for the defendant, stating that recovery was barred as a matter of law because there was

> (1) no contention that the interference with Kaiser's contract rights was intentional; (2) no evidence that Marshland had knowledge of the existence of the contract between Kaiser and Sugar Bowl Gas, and (3) no showing of facts, by affidavit or otherwise, in opposition to the motion for summary judgment, sufficient to create a genuine issue for trial of anything more than merely the negligent interference with contract rights. 455 F. 2d at 958.

Appellant attempts to avoid the effect of Robins and Kaiser Aluminum by analogizing his position to that of

the vessel owner in Robins and the pipeline owner in Kaiser Aluminum rather than to the plaintiffs in those cases, third parties "incidentally injured" by the defendants' conduct. See In Re Lyra Shipping Co., 360 F. Supp. 1188, 1190-91 (E.D. La. 1973).[3] Arguing that under ordinary rules of tort liability, the defendants here owed a duty of care to those persons dependant on continued operation of the dam and locks, Meyers contends that the defendants breached a duty running directly to him. In consequence, he seeks recovery not for damages consequent upon breach of a duty running to a third party, but upon breach of a duty running to him.

(2,3) The problem with this argument is that it misconceives the basis for denial of recovery in the cases following Robins and exemplified by Kaiser Aluminum. The law has traditionally been reluctant to recognize claims based solely on harm to the interest in contractual relations or business expectancy. The critical factor is the character of the interest harmed and not the number of parties involved. In consequence, as stated in Kaiser Aluminum, a plaintiff may not recover for interference with his contractual relations unless he shows that the interference was intentional or knowing. While the wisdom of that traditional reluctance to open to debate, the rule based upon it is too well-settled to be overturned by a panel of this court.[4]

AFFIRMED.

[3]The Second Circuit appears to have limited the Robins rule to the time charterer context in which it was first enunciated, Petition of Kinsmen Transit Co., 388 F. 2d 821 (2d Cir. 1968), and in which it survives. Federal Commerce and Navigation Co. v. M/V Marathonian, 528 F. 2d 907 (2d Cir. 1975). This entire subject is ably and exhaustively canvassed in the district court's opinion in the Marathonian case. See Federal Commerce & Navigation Co. v. M/V Marathonian, 392 F. Supp. 908 (S.D.N.Y. 1975).

[4]Appellant's attempt to avoid the effect of the conventional rule by couching his claim in the language of private action based on a public nuisance is unavailing. Again, the difficulty with appellant's case is that he seeks recovery for negligent interference with his business expectancies. Rephrasing the claim as a public nuisance claim does not change its essential character.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

DICK MEYERS TOWING SERVICE, INC., a corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, a corporation sovereign; EBY & ASSOCIATE OF ALABAMA, a joint venture; and MARTIN K. EBY CONSTRUCTION COMPANY, INC., a corporation,

Defendants.

CIVIL ACTION NO. 77-G-0023-W

Filed in Clerk's Office
Northern District of Alabama

OCT 27, 1977

James E. Vandegrift, Clerk
United States District Court
By: Loraine Richards

FINAL ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

This cause came on to be heard on the motion for summary judgment filed by defendants Martin K. Eby Construction Company, Inc., Eby & Associates of Alabama, a joint venture, and Equipment Rental & Sales Company, Inc.; and the motion for summary judgment filed by defendant United States of America. The court held oral hearings on the motions on September 1, 1977, and October 26, 1977, and has had the benefit of excellent written briefs on both sides of each motion. After careful consideration of the motions, the oral arguments of counsel, the briefs, and the applicable law, the court has reached the opinion that both motions are due to be granted, that there is no genuine issue as to any material fact, that the defendants are entitled to a judgment as a matter of law, and that there is no reason for delay in issuing a final judgment.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the defendants' motions for summary judgment be, and the same are hereby, GRANTED and that the plaintiff shall have and recover nothing. Plaintiff is taxed with the costs.

DONE this 26th day of October, 1977.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

DICK MEYERS TOWING SERVICE, INC., a corporation,

Plaintiff,

v.

THE UNITED STATES OF AMERICA, a corporation soveriegn; EBY & ASSOCIATE OF ALABAMA, a joint venture; and MARTIN K. EBY CONSTRUCTION COMPANY, INC., a corporation,

Defendants.

CIVIL ACTION NO. 77-G-0023-W

ORDER OF FINAL JUDGMENT

In conformity with and pursuant to the Final Order Granting Motions for Summary Judgment entered contemporaneously herewith, it is by the court

ORDERED, ADJUDGED and DECREED that the defendants' motions for summary judgment be, and the same hereby, GRANTED and that the plaintiff shall have and recover nothing. Plaintiff is taxed with the costs.

It is further ORDERED that this order be entered nunc pro tunc as of the 27th day of October 1977.

DONE this 27th day of January, 1978.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

No. 78-736

In the Supreme Court of the United States

OCTOBER TERM, 1978

DICK MEYERS TOWING SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 577 F. 2d 1023. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1978. The petition for a writ of certiorari was filed on November 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable for tortious interference with petitioner's contracts.

STATEMENT

In August 1975 petitioner was operating tugboats and other vessels on the Black Warrior River, a navigable waterway in Alabama (Pet. App. 2a-3a & n.1). The United States entered into a contract for construction of a replacement lock for the Bankhead Lock for purposes of improving navigation on the river. On August 11, 1975, the lock failed while under construction and was closed to river traffic for five months (Pet. App. 2a-3a).

Petitioner brought suit in the United States District Court for the Northern District of Alabama under the Federal Tort Claims Act, 28 U.S.C. 1346, alleging that the lock failed because the United States negligently maintained and operated it and because the non-federal respondents were negligent in constructing the lock. It asserted that this negligence caused economic harm to its business.

The district court granted summary judgment for the defendants (Pet. App. 6a-8a). The court of appeals affirmed (Pet. App. 1a-5a), holding that petitioner is seeking to recover for "negligent interference with [its] business expectancies" and that it could not do so under the "rule that merely negligent interference with contract rights is not actionable" (Pet. App. 3a). It also rejected petitioner's contention that tort liability arose because the government was maintaining a nuisance, pointing out that "[r]ephrasing the claim as a public nuisance claim does not change its essential character" as a claim for negligent interference with contract rights (Pet. App. 5a n.4).

ARGUMENT

1. Although petitioner brought its suit under the Federal Tort Claims Act, 28 U.S.C. 1346, the court of appeals held that "[j]urisdiction could also have been founded on the admiralty jurisdiction of the federal courts since the Black Warrior River was stipulated to be a navigable waterway and the tort claims here have a maritime nexus" (Pet. App. 3a n.1). The court of appeals analyzed petitioner's claim under admiralty doctrines (see *Schlesinger* v. *Councilman*, 420 U.S. 738, 742 n.5 (1975)), and petitioner's arguments in this Court also rest on admiralty law (see, *e.g.*, Pet. 9) rather than the Alabama law that would be applicable under the Federal Tort Claims Act (see 28 U.S.C. 1346(b)).

We agree with the court of appeals that petitioner's claim is properly regarded as a suit in admiralty because of its maritime nexus. See *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972). It is, however, barred by the decisions of this Court holding that admiralty does not supply a right of recovery for negligent interference with contract rights. See *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927).[1]

Petitioner contends (Pet. 29-31), however, that its claim is distinguishable from that of the charterer of the damaged boat who was denied recovery in *Robins*. It asserts that, unlike the charterer, who was harmed only because the boat owner was injured, petitioner's business was directly affected by the allegedly negligent actions of the United States. But, as the court of appeals observed, petitioner "misconceives the basis for denial of recovery

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[1]The present suit also would be barred under the Federal Tort Claims Act, which does not allow recovery for "[a]ny claim arising out of * * * interference with contract rights." 28 U.S.C. 2680(h). This exception categorically excludes "any claim" and therefore applies to both intentional and negligent interference with contract rights. See, *e.g.*, *Small* v. *United States*, 333 F. 2d 702 (3d Cir. 1964); *Dupree* v. *United States*, 264 F. 2d 140 (3d Cir.), cert. denied, 361 U.S. 823 (1959). Petitioner's claim would fail even in the absence of this exception, however, because Alabama does not recognize the tort of negligent interference with business expectations. See *Hennessey* v. *National Collegiate Athletic Ass'n*, 564 F. 2d 1136, 1143 (5th Cir. 1977); *Louisville & Nashville R.R.* v. *Arrow Transportation Co.*, 170 F. Supp. 597, 600 & n.3 (N.D. Ala. 1959).

in the cases following *Robins* * * *. The law has traditionally been reluctant to recognize claims based solely on harm to the interest in contractual relations or business expectancy. The critical factor is the character of the interest harmed and not the number of parties involved" (Pet. App. 5a). Indeed, in *Robins* the Court explicitly stated that the charterer could not recover even if one were to "suppose that the [charterer's] loss flowed directly from [the alleged tort]" 275 U.S. at 308.

Petitioner is wrong in arguing (Pet. 9-24) that the present case conflicts with *In re Kinsman Transit Co.*, 388 F. 2d 821 (2d Cir. 1968). *Kinsman* did not refuse to follow *Robins*, as petitioner argues; the court merely concluded that it could decide the case against the plaintiffs on the basis of "more familiar tort terrain," for the "connection between the defendants' negligence and the claimants' damages is too tenuous and remote to permit recovery" (388 F. 2d at 824, 825).[2]

There is little doubt that the Second Circuit would have denied petitioner's claim in the present case. The *Kinsman* court, in illustrating when damages are "too tenuous and remote to permit recovery," used the example of a driver who negligently causes an accident in a tunnel leading into New York during rush hour. The court observed: "we doubt that damages would be recoverable against the negligent driver in favor of truckers or contract carriers who suffered provable losses because of the delay" (*id.* at 825 n.8). The analogy in the present case, where the

[2]The Second Circuit has since followed *Robins* in a case quite similar to this one, denying recovery for damages allegedly suffered by the charterer of a vessel. See *Federal Commerce & Navigation Co. v. M/V Marathonian*, 528 F. 2d 907 (2d Cir. 1975), cert. denied, 425 U.S. 975 (1976).

United States is alleged to have negligently blocked a navigable river, causing losses to carriers because of delay, is clear.[3]

2. Petitioner also insists that it should be permitted to recover under a theory that the federal government was maintaining a nuisance or violating the Rivers and Harbors Act of 1899, 33 U.S.C. 403. Petitioner is barred from asserting these grounds for recovery because it raised them for the first time in the court of appeals. In any event, because the congressionally authorized construction of the lock would not have been a "nuisance" if carried out with due care, petitioner is merely restating its negligence claim. As the court of appeals held, this "attempt * * * is unavailing" (Pet. App. 5a n.4).

[3]Petitioner urges this Court to overrule *Robins* and analyze "the present case in terms of basic negligence principles [particularly] * * * 'foreseeability of the damages to Petitioner's business expectancy' " (Pet. 22). As our discussion of *Kinsman* establishes, however, petitioner would not establish liability even on "basic negligence principles."

At all events, petitioner exaggerates the scholarly support that exists for the position it espouses. The *Restatement of Torts* does not recognize liability for pecuniary harm caused by negligent interference with the performance of a contract. *Restatement of Torts* §766 & comment d (1939); *Restatement (Second) of Torts* §766B (Tent. Draft No. 14, 1969). And Fleming James, in the article relied on by petitioner (Pet. 18-19) (James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 Vand. L. Rev. 43, 46-48 (1972)) generally supports continued application of the rule denying tort liability for economic loss:

> [A] generation or so ago * * * there developed a lively movement in America, mostly among commentators, to expand recovery for indirect economic loss in a way that would bring it more closely into line with the law governing physical injury. * * * This movement, however, was unsuccessful and even lost the support of some of its leading adherents.
>
> * * * * *
>
> [T]o those of us who believe in the essential long-run soundness of the judicial process, [this history] suggest[s] that the restrictive rule may represent good sense and that the pragmatic explanation offered in its defense deserves careful consideration. [Footnotes ommitted.]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solictor General

BARBARA ALLEN BABCOCK
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RONALD R. GLANCZ
BRUCE G. FORREST
Attorneys

JANUARY 1979

DOJ-1979-01

IN THE

UNITED STATES SUPREME COURT

NO. 78-736

DICK MYERS TOWING SERVICE, INC.,
Petitioner

versus

THE UNITED STATES OF AMERICA;
EBY AND ASSOCIATES OF ALABAMA;
MARTIN K. EBY CONSTRUCTION COMPANY,
INC.; and EQUIPMENT RENTAL AND SALES
COMPANY, INC.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

SECONDARY AUTHORITIES

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Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Come now defendants, Eby & Associates of Alabama; Martin K. Eby Construction Company, Inc.; and Equipment Rental and Sales Company, Inc., (hereinafter collectively referred to as Eby) and presents herewith its arguments in opposition to the Petition For Writ of Certiorari, and prays this Court to deny review of the judgment of the United States Court of Appeals For the Fifth Circuit entered in the above styled case on August 7, 1978.

OPINIONS BELOW

On August 7, 1978 the United States Court of Appeals For The Fifth Circuit affirmed the granting of Motions For Summary Judgment on behalf of the defendants, 577 F.2d 1023 (1978), a correct copy of which has been appended to the Petition at pages 1A-8A.

JURISDICTION

Defendants Eby do not question the jurisdictional right of plaintiff to make this Petition For Writ of Certiorari.

QUESTIONS PRESENTED

I. Does there exist a conflict in decisons between circuits which calls into question the validity of the rule of law denying recovery for mere negligent interference with business expectancy?

II. Was the United States Court of Appeals For The Fifth Circuit so clearly erroneous in its application of the doctrine of *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 48 S.C. 134, 32 L.Ed. 290 (1927), so as to warrant review by this Court?

III. Was the United States Court of Appeals For The Fifth Circuit clearly erroneous in disallowing Petitioner to proceed based on a theory of public nuisance?

STATEMENT OF THE CASE

1. FACTS

Respondent sets forth as brief a capsule of the salient facts as possible because of the Petitioner's total failure to apprise the Court of the facts which gave rise to this litigation.

Martin K. Eby Construction Company, Inc., in joint venture with Equipment Rental and Sales Company, Inc., under the name and style of Eby and Associates of Alabama, contracted with the United States Government through their agency, the Mobile District Corps of Engineers, for construction of a "Replacement Lock and Non-Overflow Dam", at the John Hollis Bankhead Lock and Dam on the Black Warrior River in Tuscaloosa County, Alabama. Said contract bore number DACW01-72-C0115. The work under said contract was to provide a replacement lock and modifications to the then existing Bankhead Lock and Dam. The flow of the Black Warrior River was already interrupted by the very existence of the Lock and Dam, and the work referred to did not further impede the flow of the river.

On or about August 11, 1975 the contract between Eby and the United States had been substantially completed, and the work performed by Eby turned over to and accepted by the United States Corps of Engineers. The Lock and Dam on that date was in the hands and under the control of the Corps of Engineers. Because of a mishap in the Lock on or about August 11, 1975, the lock portion of the facility was disabled and closed to traffic for several months.

2. COURSE OF PROCEEDINGS AND DISPOSITION

Petitioner essentially states the course of proceedings to date.

ARGUMENT

In opposition to the positions and arguments of the Petition For Writ of Certiorari, defendants Eby submit herewith their agruments of law.

I. THE SUGGESTED CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE

FIFTH AND SECOND CIRCUITS DOES NOT EXIST, AND THERE EXISTS NO OTHER CREDIBLE REASON TO OVERRULE THE RULE OF LAW ADOPTED BY THIS COURT IN *ROBINS DRY DOCK AND REPAIR COMPANY V. FLINT*, 275 U.S. 303, 48 S.C. 134, 72 L.Ed. 290 (1927), OR TO FAIL TO APPLY SAID RULE TO THIS CASE.

The Petition For Writ of Certiorari presents three reasons why this Court, in its discretion, should review the ruling of the United States Court of Appeals For The Fifth Circuit. First, it is suggested that the subject case creates a conflict between the Fifth Circuit Court of Appeals and the Second Circuit Court of Appeals, and that this conflict puts in question the validity of the well recognized tort principle that there is no cause of action for "negligent" interference with business expectancy. One of the roots of this tort doctrine is found in this Court's opinion in *Robins Dry Dock and Repair Co. v. Flint,* 275 U.S. 303 48 S.C. 134, 72 L.Ed. 290 (1927). Petitioner labels the pronouncements of Justice Holmes in *Robins, supra,* as "wholly artificial", and suggests that this Court abandon this authority in favor of the recommendations of legal theorists and law review commentators.

Secondly, Petitioner implies that the United States Court of Appeals For The Fifth Circuit was clearly erroneous in applying the doctrine of *Robins* to it, because it does not resemble the unsuccessful plaintiff in *Robins*. Lastly, Petitioner suggests that the United States Court of Appeals For The Fifth Circuit committed error by not allowing it to proceed with this litigation under the "public nuisance" theory. The Petition makes its most diligent presentation in regard to the first argument or basis for review.

Petitioner seeks review by this Court of the decision of the Fifth Circuit Court of Appeals on the basis that that

decision is in conflict with a decision of the Second Circuit Court of Appeals *Petition of Kinsmen Transit Co.,* 388 F.2d 821 (2d. Cir. 1968). Petitioner further asserts that the conflict between these decisions raises a question as to whether or not the law recognizes a cause of action for recovery of loss of business expectancy based on negligence. A brief review of the respective holdings will illustrate the fallacy of Petitioner's argument.

The Fifth Circuit in the subject case recognized and applied the well established tort rule that merely negligent interference with contract rights is not actionable. This rule developed in American and British Jurisprudence in the latter half of the Nineteenth Century and the early part of the Twentieth Century. The rule became firmly established in this country with the decision of this Court in *Robins Dry Dock and Repair Co. v. Flint,* 275 U.S. 303, 48 S.C. 134, 72 L.Ed. 290 (1927). The pronouncements of law made by Justice Holmes have become canonized by numerous decisions of both State and Federal courts, and has been succinctly summarized by the *Restatement of Torts 2d.* §766 B (Tent. Draft No. 14, 1969) in the following terms:

> "[T]here is no liability for pecuniary harm caused by
> (a) negligent interference with the performance of a contract, or
> (b) negligently causing a third person not to enter into or continue a business or other advantageous relationship with another."

The *Robins, supra,* case is well documented in the annals of American Jurisprudence as the highest authority and precedent for the doctrine that there is no cause of action for negligent interference with business expectancy. In fact this rule has been universally referred to as the *Robins* rule.

The Fifth Circuit Court of Appeals had already applied *Robins,* supra, to a very similar case presented to it in 1972. *Kaiser Aluminum and Chemical Co. v. Marshland Dredging Co.,* 455 F.2d 955 (5th Cir. 1972). The Fifth Circuit on that occasion acknowledged the *Robins* rule, and held that without a showing of intentional interference no cause of action could be stated for a pecuniary loss. In the instant case the Fifth Circuit relied upon both *Robins, supra,* and *Kaiser, supra,* in affirming the District Court's grant of summary judgment.

The case of *Petition of Kinsmen Transit Co.,* 388 F.2d 821 (2d Cir. 1968) is quite factually similar to the present case. The *Kinsmen* plaintiffs sought to recover losses incurred because of their inability to use the Buffalo River, occasioned they claimed because of defendant's negligence in obstructing the flow of the river. District Court Judge Burke dismissed the claims upon the authority of *Robins, supra,* and the doctrine that recovery could not be had for a non-intentional or merely negligent interference with the plaintiff's contracts.

Judge Kaufman, authoring the opinion for the Second Circuit Court of Appeals, affirmed the decision of the District Court. Judge Kaufman opined that plaintiffs couldn't recover because their claims occurred only because the downed bridge made it impossible to move traffic along the river, and that the plaintiff's claims were too remote and tenuous to permit recovery. The opinion did not challenge the authority of the *Robins, supra,* decision, nor did it declare the doctrine of negligent interference inapplicable in the Second Circuit.

To suggest as Petitioner does that the present opinion of the Fifth Circuit and the *Petition of Kinsmen, supra,* case are at odds or in conflict is to ignore the holdings of each. Both of these cases stand for the proposition that there can

be no cause of action for non-intentional or negligent interference with contract relations or business expectations. To imply that the Second Circuit Court of Appeals has abandoned the doctrine of *Robins Dry Dock and Repair Co. v. Flint, supra,* as "wholly artificial" is to ignore the Second Circuit's 1975 decision of *Federal Commerce and Navigation Co., LTD. v. M/V Marathonia,* 528 F.2d 907 (2d Cir. 1975), and the ultimate disposition of that case. In a *per curiam* opinion, attended by Judge Kaufman, the Second Circuit Court of Appeals recognized that the *Robins* rule denies relief to one injured by negligent interference with contract, and that such rule, despite some criticism from commentators, remains a principle of law from which the Supreme Court has shown no indication to depart. Again the District Court's reliance upon *Robins Dry Dock and Repair Co. v. Flint, supra,* was affirmed.

A Petition For Writ of Certiorari then followed the Second Circuit's affirmation, and said Petition was denied by this Honorable Court in May of 1976. *Federal Commerce and Navigation Co. LTD., v. M/V Marathonia, cert. den.,* 425 U.S. 975, 96 S.C. 2176, 48 L.Ed. 2d 799 (May 19, 1976). A reading of the District Court opinion in *Federal Commerce and Navigation Co., LTD. v. M/V Marathonia,* 392 F. Supp. 908 (S.D. N.Y.), indicates that the plaintiffs there sought an abandonment of the *Robins* rule, and application of a "negligence-causation-foreseeability doctrine". Id. at p. 913. We note from the Second Circuit's opinion that the plaintiff made the same argument to the Court of Appeals. *Supra,* at 907. Of course, this "negligence-causation-foreseeability doctrine" is the basis of the Petition presently being considered, and we fell sure that the exact arguments being made by the Petitioner herein were made by the Petition For Certiorari in the *Federal Commerce and Navigation Co., LTD., v. M/V Marathonia* case.

Defendants Eby believe that the validity and vitality of the *Robins* rule remains as sound as it was in May of 1976 when this Court correctly denied a request for review based on the same challenge as presented by this Petition. This Court has been asked to retire the *Robins* rule on other occasions, and on each such occasion the Court has refused to consider abandonment of this ageless and well founded principle. *Borcich v. Annich,* 191 F.2d 392 (9th Cir. 1951), *cert. den.* 342 U.S. 905, 72 S.C. 293, 96 L.Ed. 677 (1953).

Eby urges this Court to deny this Petition as it did the petition for review in *Federal Commerce and Navigation Co., LTD. v. M/V Marathonia, supra,* and to give no credence to the theoretical postulates of those commentators who seek to cloud the validity of the *Robins* rule. The courts in their wisdom have realized what these commentators have failed to consider. The courts have universally explained that one of the bases for the *Robins* rule was the absurd extremes to which a relaxation of the rule might be taken. To allow a cause of action to everyone who suffered economic disgruntlement because of a tort to one person or his property would ensnarl the legal system beyond comprehension. Judge Kaufman recognized the dilemma that would result if a "foreseeability doctrine" went into effect. He noted:

> "Although to reason by example is often merely to restate the problem, the following illustration may be an aid in explaining our result. To anyone familiar with N.Y. traffic there can be no doubt that a foreseeable result of an accident in the Brooklyn Battery Tunnel during rush hour is that thousands of people will be delayed. A driver who negligently caused such an accident would certainly be held accountable to those physically injured in the crash. But we doubt that damages would be recoverable against the negligent driver in favor of truckers or contract carriers

> who suffered provable losses because of the delay or to the wage earner who was forced to "clock in" an hour late. And yet it was surely foreseeable that among the many who would be delayed would be truckers and wage earners."

Petition of Kinsmen, supra, at 825 n.8.

Petitioner has itself recognized the quagmire that would result if this Court approved the doctrine it suggests. On page 30 of its brief to the Fifth Circuit it suggested to that Court that the practical impositions of the suggested doctrine could be avoided by the fashioning of a rule that would allow recovery solely within the factual contours of the present controversy. Petitioner fails to foresee that if this Court honored such an argument, every litigant would be before this Court with a similar request. Clearly, in the words of Justice Holmes, "The law does not spread its protection so far."

To deny this Petition works no unconscionable prejudice to Petitioner. Petitioner has failed to demonstrate that it might be able to recover in this case if the purported "negligent-causation-foreseeability doctrine" supplanted the *Robins* rule. If this doctrine was born out of the postulates of Judge Kaufman in *Petition of Kinsmen, supra,* surely it would be subject to the same limitations imposed on the facts of that case. In that matter, plaintiff claimed that the defendants by their negligence had made the Buffalo River impassable. They claimed entitlement to damages for their inability to use the river going past the point of obstruction. Judge Kaufman found that the plaintiffs were not so entitled to recover, and said that these damages were too remote and too tenuous to support a cause of action.

Dick Meyer claims in this case that the defendants by their negligence made the Black Warrior River impassable, and it claims entitlement to damages from its inability to

use the river. So identical are the claims of the Petitioner with those of the *Kinsmen* plaintiff, that one must concur that even under the "negligent-causation-foreseeability" doctrine Petitioner's claims would, as a matter of law, be deemed too remote and too tenuous.

Of course, for Petitioner to suggest that it might be entitled to recover if the *Petition of Kinsmen* decision predominated, is to demonstrate a misunderstanding of that decision. Clearly, Judge Kaufman's decision merely affirmed the correctness of the rule denying recovery for negligent interference with business expectancy, and grounded his confirmation of that rule on the basis that such damages are too remote to be within the protection provided by the law. It is an incorrect analysis to suggest that the *Petition of Kinsmen* case has in some way eroded the *Robins* rule so as to allow recovery for negligent interference.

In summary, defendants Eby believe that this Petition is not worthy for review for three reasons:

First, there is no conflict between circuits in regard to whether a party can maintain a cause of action for negligent interference with business expectancy. Both the Fifth Circuit and the Second Circuit recognize that this rule, which has come to be known as the *Robins* rule, is the law of the land.

Second, the arguments made by the Petition have already been advanced to this Court by the Petition For Writ of Certiorari in *Federal Commerce and Navigation Co., LTD. v. M/V Marathonia, supra,* and those arguments are no more convincing now than they were when the Court denied certiorari in May of 1976.

Third, the opinion of the Fifth Circuit Court of Appeals is correct, since it is based upon the valid and vital precedent of *Robins Dry Dock & Repair Co. v. Flint, supra,* which compelled dismissal of this action.

II. THE FIFTH CIRCUIT COURT OF APPEALS COMMITTED NO ERROR IN APPLYING THE CASE OF *ROBINS DRY DOCK AND REPAIR CO. V. FLINT,* 275 U.S. 303, 48 S.C. 134, 72 L.Ed. 290 (1927), SO AS TO DENY THE CLAIMS OF PETITIONER.

Petitioner contends that the Fifth Circuit Court of Appeals was in error when it applied the rule of law pronounced by *Robins Dry Dock and Repair Co. v. Flint,* 275 U.S. 303, 48 S.C. 134, 72 L.Ed. 290 (1927), so as to deny Petitioner a right of recovery. Petitioner suggests that *Robins Dry Dock and Repair Co. v. Flint, supra,* actually supports a recovery on its part rather than a denial. Petitioner comes to this puzzling conclusion by suggesting that its counter part in the *Robins* situation is the owner of the damaged vessel rather than the plaintiff-time charterer who sued for its inability to use the damaged property. The Fifth Circuit saw through Petitioner's deranged comparison, noting that Petitioner had misconceived the basis for denial to the plaintiff in *Robins, supra.* The basis of Justice Holmes' denial to the *Robins* plaintiff was the absence of an interest protected by law against unintended injuries to the property of another. It is the interest for which Petitioner seeks protection which identifies it with the *Robins* plaintiff, and demonstrates its dis-similarity to the vessel owner in *Robins.*

We have attached as an appendix to this brief a copy of the original and amended complaints filed by the Petitioner in this cause. The allegations of that complaint clearly demonstrate that Petitioner's claimed interest is the right to use the Bankhead Lock and Dam. Petitioner says that because of damage done to the Lock it was prevented from using it. Petitioner does not contend that it owned the Lock; admittedly the Lock belonged to the United States Government. Petitioner does not contend that any property it

owned was damaged, merely that it lost profits from its business because of its inability to use the damaged lock.

Simple logic compels the finding of a parallel between the *Robins* plaintiff and Petitioner. The claims made by each are in fact indistinguishable. The interest for which protection is sought, the right to use the damaged property of another, is that interest which Justice Holmes found repugnant to the law unless an intent to injure existed. Accordingly, under any rational analysis of the *Robins* case, it cannot be construed as supporting a right to recover by Petitioner.

Petitioner has advanced this argument to both the District Court and the Fifth Circuit Court of Appeals, and now seeks review of their disregard for same by this Court. Yet, Petitioner fails in its burden of demonstrating that identifying Petitioner with the *Robins* plaintiff is so clearly erroneous that review by this Court is compelled. Accordingly, the Petition should not be granted on this basis.

III. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DID NOT ERR IN REFUSING TO ALLOW PETITIONER TO PROCEED BASED ON A THEORY OF PUBLIC NUISANCE.

In the court below Petitioner sought a reversal of the trial court's entry of summary judgment by contending that it had a right to recover based on a theory of public nuisance. As demonstrated by the original and amended complaints, appended to this brief (p. 1A-11A), this theory was not pled or in any way advanced at the trial court level. The Fifth Circuit Court of Appeals properly failed to consider Petitioner's right to recover on this theory based on the settled principle that a party may not raise on appeal a theory of recovery not presented in the lower court. *City of*

New Albany v. Burke, 78 U.S., 11 Wall. 96, 20 L.Ed. 155 (1870); *Coburn v. Cedar Valley Land and Cattle Co.*, 138 U.S. 196, 11 S.C. 258, 34 L.Ed. 876 (1891); *Thomas v. Taylor*, 224 U.S. 73, 32 S.C. 403, 56 L.Ed. 673 (1912); *Capp v. Humble Oil & Refining Co.*, 536 F.2d 80 (5th Cir. 1976); *Pearson v. Ecological Services Corp.*, 522 F.2d 171 (5th Cir. 1975), *reh. den.* 525 F.2d 1407; *Cedillo v. Standard Oil Co. of Texas*, 291 F.2d 246 (5th Cir. 1961), *cert. den.* 368 U.S. 955, 82 S.C. 397.

Accordingly, the Fifth Circuit Court of Appeals was entirely correct, and certainly not clearly erroneous, in failing to give consideration to this new theory of recovery Petitioner attempted to advance at the appellate level.

Furthermore, the Fifth Circuit recognized that even if it considered plaintiff's argument that the law allowed recovery for public nuisance, rephrasing the Petitioner's claim as a public nuisance does not change its essential character, so as to avoid the death knell which results because of the rule disallowing recovery for negligent interference with business expectancies.

Further still, we demonstrated in our brief to the Fifth Circuit that Petitioner could not state a cause of action for public nuisance under the laws of the State of Alabama. This was true because Petitioner would be unable to demonstrate damages different in kind from those suffered by the general public, by reason of the inability of the Lock and Dam to operate. The principles of law applicable to this issue are quite eloquently stated in the case of *Walls v. Smith*, 167 Ala. 138, 52 So. 320 (1910), a case where the Alabama Court denied a private individual a right to recover for the blocking of a public highway. The court made these pertinent statements:

> "The text-books and adjudicated cases are agreed that for an obstruction of a public and common right

of way no private action will lie, unless it be alleged and shown that the plaintiff has thereby suffered injury peculiar to himself; that is, different in kind and degree from that suffered by the public. The reason for this rule, accepted from the beginning as sufficient, is that the offender should be punished by indictment as for the maintenance of a common nuisance, or the nuisance be abated by a bill in equity in the name of the State; for otherwise suits would be multiplied intolerably.

. . . .

The reported cases show that the courts have been much vexed in the application of this general principle to particular cases. This much, however, seems clear: That if one's access from his property to the highway be so materially impaired as to effect its value, or if, while attempting to use the highway, one sustains direct injury to his personal property, an action will lie. And here we note the absence from the complaint in this case of any averment of injury of either kind. But where the obstruction is so remote from plaintiff's property as not to effect its permanent or rental value—and in this case there is no allegation that the value of plaintiff's property was impaired — so that the plaintiff is merely driven to a circuitous route or a longer road, the authorities hold that no peculiar injury is shown, but only an interference with the common right of passing and repassing.

. . . .

[I]f the plaintiff proves no special damage to himself beyond being delayed on several occasions in passing along a highway, and being obliged, in common with all others who would use the way, either to go by a less direct road or to remove the obstruction, he cannot maintain an action."

52 So. at 332.

As demonstrated by the pleadings, appellant merely claims that because of the failure of the Bankhead Lock

and Dam its towing operation was put to the additional expense of finding another route to its customers. Alabama law has conclusively established that the fact that a plaintiff is put to a more circuitous route does not show facts sufficient to demonstrate that complainant has suffered such a special injury as would entitle him to maintain an action for public nuisance. *Ayers v. Stidham,* 260 Ala. 590, 71 So. 2d 95 (1954).

Accordingly, the law of Alabama would prevent this Petitioner from maintaining a cause of action for public nuisance, and based upon this precedent the Fifth Circuit did not commit error in failing to allow Petitioner to proceed upon this theory.

Nor did the Fifth Circuit commit error by dismissing this theory because of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §403, because the Fifth Circuit had already ruled that that Act did not create a private right to sue on the part of any individual. *Guthrie v. Alabama By Products Co.,* 456 F.2d 1294 (5th Cir. 1972).

In summary, Petitioner has failed to demonstrate any clear error on the part of the Fifth Circuit Court of Appeals in failing to allow Petitioner to proceed on the theory of public nuisance. By law Petitioner was not entitled to raise this theory at the appellate level, and even had Petitioner been allowed to raise this theory the Fifth Circuit would have been compelled to dismiss same by reason of Alabama law.

CONCLUSION

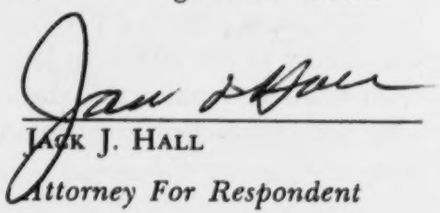
The Petition For Writ of Certiorari wholly fails to advance a legitimate basis for the issuance of a Writ of Certiorari to the Fifth Circuit Court of Appeals. Petitioner is incorrect in its suggestion that there exists a conflict between the Fifth Circuit and the Second Circuit Court of Appeals,

which calls into question the established principle of law denying recovery for negligent interference with business expectancies. The fact of the matter is that both the Fifth Circuit and the Second Circuit deny recovery for the type of damages claimed by the Petitioner in the subject suit, and neither circuit has abandoned the *Robins* rule.

Futhermore, the arguments Petitioner advances for overturning *Robins Dry Dock and Repair Co. v. Flint, supra,* have already been expresed to this Court, and rejected by the denial of certiorari in the case of *Federal Commerce and Navigation Co., LTD. v. M/V Marathonia, supra.* Petitioner advances no new, different or more compelling reasons for abandonment of the vested *Robins* precedent than were advanced on that occasion.

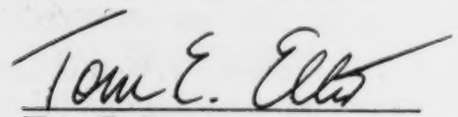
Since Petitioner clearly cannot escape identification with the plaintiff denied recovery by *Robins,* and failed to present as a theory of recovery "public nuisance" when pleading to the trial court, the Fifth Circuit was not clearly erroneous in its denial of relief to Petitioner on these bases.

Defendants Eby pray this Court to deny the Petition For Writ of Certiorari on the basis of its arguments of law.



JACK J. HALL

Attorney For Respondent



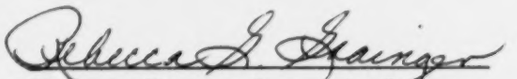
TOM E. ELLIS

Attorney For Respondent

STATE OF ALABAMA)
JEFFERSON COUNTY)

I, the undersigned Notary Public, in and for said County in said State, hereby certify that JACK J. HALL and TOM E. ELLIS, who are known to me, acknowledged before me on this day that, being informed of the contents of the foregoing, they, as counsel for the Respondents, affixed their signatures hereto voluntarily on the day the same bears date.

GIVEN under my hand this the 20th day of December, 1978, in authentication of which I have hereunto affixed my official seal.



NOTARY PUBLIC, STATE AT LARGE

CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Brief in Opposition to the Petition For Writ of Certiorari have been served on the counsel of record for each party on the day of December, 1978, by United States mail, postage prepaid, and properly addressed.

Tom E. Eby

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
– SOUTHERN DIVISION –

DICK MEYERS TOWING SERVICE, INC., a corporation Plaintiff,	)	
v.	)	
THE UNITED STATES OF AMERICA, a corporation sovereign; EBY & ASSOCIATE OF ALABAMA, a joint venture; MARTIN K. EBY CONSTRUCTION COMPANY, INC., a corporation, Defendants.	)	Civil Action No. 76-420-P COMPLAINT

FIRST CAUSE OF ACTION

1. This is a suit in the nature of a civil action against The United States of America and others, and jurisdiction is based on *United States Code,* Title 28, Section 1346.

2. At all times hereinafter mentioned, Plaintiff Dick Meyers Towing Service, Inc., was and is an Alabama corporation, with its principal place of business in Mobile, Alabama.

3. At all times hereinafter mentioned, Defendant The United States of America was and is a corporation sovereign.

4. At all times hereinafter mentioned, Defendant Eby & Associate of Alabama was and is a joint venture composed of Martin K. Eby Construction Company, Inc., a corporation; and Equipment Rental and Sales Company, Inc., a corporation, and has its principal place of business in Tuscaloosa, Alabama.

5. At all times hereinafter mentioned, Defendant Eby Construction Company, Inc., is a corporation with its principal place of business in Wichita, Kansas.

6. On or about the 23rd of June, 1972, The United States of America by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army, let Contract No. DACW 01-72-C-0115 (the "contract") for the construction and/or replacement of a lock and dam on the Black Warrior River in Alabama hereinafter sometimes referred to as the Bankhead Lock and Dam, or Bankhead Lock.

7. On or about the 11th day of August, 1975, the Defendant, The United States of America, by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army, was operating and maintaining said Bankhead Lock and Dam.

8. On or about 11th day of August, 1975, said Bankhead Lock and Dam failed, or failed to operate properly, causing the cessation of waterborne commerce and transportation on the Black Warrior River in Alabama.

9. On or about 11th day of August, 1975, the Plaintiff Dick Meyers Towing Services, Inc., was operating tugboats and/or other waterborne vessels in the performance of waterborne commerce and transportation on the Black Warrior River in Alabama, near the said Bankhead Lock and Dam.

10. The Defendants Eby & Associate of Alabama and Martin K. Eby Construction Company, Inc., in performing the completion of the aforementioned contract, provided such unworkmanlike construction as to cause the aforementioned failure of said Bankhead Lock and Dam.

11. As a direct and proximate consequence of said Defendants' unworkmanlike construction and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and

business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendants in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

SECOND CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Service, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. Defendants Eby & Associate of Alabama and Martin K. Eby Construction Company, Inc., so negligently constructed said Bankhead Lock and Dam as to cause the aforementioned failure of said Bankhead Lock and Dam.

3. As a direct and approximate consequence of said Defendants' negligent construction and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendants in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

THIRD CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Service, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. In the performance of said contract hereinabove mentioned, Defendants Eby & Associate of Alabama and Martin K. Eby Construction Company, Inc., so negligently designed the construction of said Bankhead Lock and Dam as to cause the aforementioned failure of said Bankhead Lock and Dam.

3. As a direct and proximate consequence of said Defendants' negligent design and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendants in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

FOURTH CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Services, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. The Defendant, The United States of America, by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army, so negligently operated said Bankhead Lock and Dam at the times heretofore mentioned as to cause said failure of said Bankhead Lock and Dam.

3. As a direct and proximate consequence of said Defendant's negligent operation and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendant in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

FIFTH CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Services, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. The Defendant, The United States of America, by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army, so negligently maintained said Bankhead Lock and Dam at the times heretofore mentioned as to cause said failure of said Bankhead Lock and Dam.

3. As a direct and proximate consequence of said Defendant's negligent operation and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendant in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

SIXTH CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Services, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. The Defendant, The United States of America, by and through its agency and instrumentality, the Mobile District Corps of Engineers, Department of the Army, so negligently failed to inspect the construction and operation of said Bankhead Lock and Dam at the times heretofore mentioned as to cause said failure of said Bankhead Lock and Dam.

3. As a direct and proximate consequence of said Defendant's negligent failure to inspect and subsequent failure of said Bankhead Lock and Dam Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendant in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

SEVENTH CAUSE OF ACTION

1. Plaintiff Dick Meyers Towing Service, Inc., herein adopts by reference and incorporates paragraphs 1 - 9 of its First Cause of Action hereinabove as if fully set out herein.

2. The Defendants, in the performance of the aforementioned contract, and in the operation of said Bankhead Lock and Dam provided such unworkmanlike construction, such negligent construction, such negligent design, so negligently operated said Bankhead Lock and Dam and so negligently failed to inspect the operation, maintenance, and construction of said Bankhead Lock and Dam as to cause the said failure aforementioned.

3. As a direct and proximate consequence of said Defendant's aforesaid negligence and subsequent failure of said Bankhead Lock and Dam, Plaintiff's business and business operations consisting of waterborne commerce and transportation were substantially damaged.

WHEREFORE, Plaintiff demands judgment against said Defendants in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

/s/ MICHAEL A. WERMUTH

Attorney for Plaintiff
157 North Conception Street
Mobile, Alabama 36602
(205) 432-0738

/s/ J. MICHAEL DRUHAN, JR.

Attorney for Plaintiff
157 North Conception Street
Mobile, Alabama 36602
(205) 432-0738

Of Counsel:
WILKINS & DRUHAN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
– SOUTHERN DIVISION –

DICK MEYERS TOWING SERVICE, INC., a corporation Plaintiff, v. THE UNITED STATES OF AMERICA, a corporation sovereign; EBY & ASSOCIATE OF ALABAMA, a joint venture; MARTIN K. EBY CONSTRUCTION COMPANY, INC., a corporation; and EQUIPMENT RENTAL AND SALES COMPANY, INC., a corporation, Defendants.	)	Civil Action No. 76-420-P COMPLAINT

AMENDMENT TO COMPLAINT

Plaintiff amends its original complaint by adding as a defendant Equipment Rental and Sales Company, Inc., a corporation.

Plaintiff further amends its complaint by changing paragraph "5" of its First Cause of Action to read as follows:

"5. At all times hereinafter mentioned, Defendants Martin K. Eby Construction Company, Inc., and Equipment Rental and Sales Company, Inc., were and are corporations with their principal places of business in Wichita, Kansas."

Plaintiff further amends its complaint by changing paragraph "10" of its First Cause of Action to read as follows:

"10. The Defendants Eby & Associate of Alabama, Martin K. Eby Construction Company, Inc., and Equip-

ment Rental and Sales Company, Inc., in performing the completion of the aforementioned contract, provided such unworkmanlike construction as to cause the aforementioned failure of said Bankhead Lock and Dam."

Plaintiff further amends its complaint by changing paragraph "2" of its Second Cause of Action to read as follows:

"2. Defendants Eby & Associate of Alabama, Martin K. Eby Construction Company, Inc., and Equipment Rental and Sales Company, Inc., so negligently constructed said Bankhead Lock and Dam as to cause the aforementioned failure of said Bankhead Lock and Dam."

Plaintiff further amends its complaint by changing paragraph "2" of its Third Cause of Action to read as follows:

"2. In the performance of said contract hereinabove mentioned, Defendants Eby & Associate of Alabama, Martin K. Eby Construction Company, Inc., and equipment Rental and Sales Company, Inc., so negligently designed the construction of said Bankhead Lock and Dam as to cause the aforementioned failure of said Bankhead Lock and Dam."

/s/ MICHAEL A. WERMUTH
Attorney for Plaintiff
Post Office Box 154
Mobile, AL 36601
(205) 432-0738

Of Counsel:
WILKINS & DRUHAN

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury as to all issues in this case.

/s/ MICHAEL A. WERMUTH
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
– SOUHERN DIVISION –

DICK MEYERS TOWING SERVICE, INC.,	)	
Plaintiff	)	Civil Action
v.	)	No. 76-420-P
UNITED STATES OF AMERICA, etc., et al.,	)	
Defendants	)	

AMENDMENT TO COMPLAINT

Plaintiff amends its Complaint as of course under Rule 15 (a), in the following respects:

"FOURTH CAUSE OF ACTION

(Add the following as paragraph number "4")

4. Plaintiff avers that it has presented a claim for damages to the U.S. Army Corps of Engineers, as more particularly shown by Exhibit "A" attached hereto, and made part hereof, and further avers that said agency has failed to make a final disposition of said claim for a period of at least six months next preceeding the institution of the instant action."

"FIFTH CAUSE OF ACTION

(Add the following as paragraph number "4":)

4. Plaintiff avers that it has presented a claim for damages to the U.S. Army Corps of Engineers, as more particularly shown by Exhibit "A" attached hereto, and made part hereof, and further avers that said agency has failed to make a final disposition of said claim for a period of at least six months next preceeding the institution of the instant action."

"SIXTH CAUSE OF ACTION

(Add the following as paragraph number "4":)

4. Plaintiff avers that it has presented a claim for damages to the U.S. Army Corps of Engineers, as more particularly shown by Exhibit "A" attached hereto, and made part hereof, and further avers that said agency has failed to make a final disposition of said claim for a period of at least six months next preceeding the institution of the instant action."

"SEVENTH CAUSE OF ACTION

(Add the following as paragraph number "4":)

4. Plaintiff avers that it has presented a claim for damages to the U.S. Army Corps of Engineers, as more particularly shown by Exhibit "A" attached hereto, and made part hereof, and further avers that said agency has failed to make a final disposition of said claim for a period of at least six months next preceeding the institution of the instant action."

/s/ MICHAEL A. WERMUTH

Attorney for Plaintiff
Dick Meyers Towing Service, Inc.
Post Office Box 154
Mobile, AL 36601
(205) 432-0738

CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of November, 1976 served a copy of the foregoing amendment on counsel to all parties to this proceeding by serving Jack J. Hall, Esquire, attorney for EBY & ASSOCIATE OF ALABAMA,

MARTIN K. EBY CONSTRUCTION CO., INC., and EQUIPMENT RENTAL AND SALES CO., INC., and Edward J. Vulevich, Jr., Esquire, Assistant United States Attorney, by placing the same in United States mail properly addressed and first-class postage prepaid.

/s/ MICHAEL A. WERMUTH